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February 2, 1999

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BY HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

RECEIVED
FEB 02 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: Notice of Ex Parte Communication Regarding
Interconnection and Resale Obligations Pertaining to
Commercial Mobile Radio Services, CC Docket No. 94-54**

**Notice of Ex Parte Communication Regarding the
Broadband Personal Communications Services Alliance
of the Personal Communications Industry Association,
Petition for Forbearance (filed May 22, 1997), DA No. 97-
1155**

Dear Ms. Salas:

Yesterday, on behalf of the Telecommunications Resellers Association ("TRA"), the undersigned of Hogan and Hartson L.L.P.; David Gusky, Vice President, TRA; and Steven Trotman, Director of Local Resale Services, TRA; met with Tom Sugrue, Chief, Wireless Telecommunications Bureau; James Schlichting, Deputy Chief, Wireless Telecommunications Bureau; and Jeanine Poltronieri, Senior Counsel, Wireless Telecommunications Bureau, regarding the referenced proceedings.

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In the meeting, TRA discussed its position regarding the importance of unrestricted wireless resale to a competitive wireless and full service market. TRA also discussed the importance of Commission enforcement of the current resale obligation and the need to eliminate any sunset of the resale requirement. TRA also discussed the points made in the attached November 13, 1998, letter to Chairman Kennard.

I have hereby submitted two copies of this notice for each of the referenced proceedings to the Secretary, as required by the Commission's rules. Please return a date-stamped copy of the enclosed (copy provided).

Please contact the undersigned if you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Linda L. Oliver". The signature is fluid and cursive, with the first name "Linda" and last name "Oliver" clearly distinguishable.

Linda L. Oliver
Counsel for Telecommunications
Resellers Association

Enclosure

cc: Tom Sugrue
James Schlichting
Jeanine Poltronieri



Telecommunications
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November 13, 1998

BY HAND DELIVERY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

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FEB 02 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: Interconnection and Resale Obligations Pertaining to
Commercial Mobile Radio Services, CC Docket No. 94-54**

Dear Chairman Kennard:

I am writing on behalf of the Telecommunications Resellers Association ("TRA") regarding the pending petitions for reconsideration in the referenced proceeding. The pending petitions seek reconsideration of the Commission's July 1996 decision to apply a resale requirement to all CMRS providers and to sunset that requirement five years after initial PCS licensing is completed. ^{1/}

TRA strongly supports the Commission's decision to apply to all broadband CMRS providers the Commission's long-standing policy requiring unrestricted resale. TRA is concerned, however, that the Commission's decision to sunset that requirement (effective November 24, 2002) will have a serious adverse impact on competition and consumer choice in both the wireless market and on the market for telecommunications services generally.

^{1/} Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, CC Docket No. 94-54, 11 FCC Rcd 18455, FCC 96-23, released July 12, 1996 ("CMRS Resale Order").

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For the reasons discussed in the petition for reconsideration filed by the National Wireless Resellers Association ("NWRA") and in this letter, TRA urges the Commission to reconsider its decision to sunset its wireless resale policy. 2/

In the event the Commission decides to reaffirm its decision to adopt a sunset provision, the Commission should expressly provide in its reconsideration order that (1) the resale rule requires facilities-based carriers to provide resellers with resale agreements and, if they have the capability, electronic billing data; (2) the state of competition in the wireless industry will be reexamined before any sunset takes place; and (3) existing wireless resale customers will be protected from losing service if and when a sunset does occur.

I. The Benefits of Unrestricted Wireless Resale

The Commission has often recognized the many benefits of unrestricted wireless resale. 3/ They include:

Price and Service Competition: Wireless resellers create price competition by buying at volume discounted prices and reselling to smaller customers. Because they can offer the services of any underlying carrier, resellers can shop around for the best prices on behalf of their customers.

Full Service Competition: Wireless resale is essential to promoting a competitive wireless market, and to ensuring a competitive market for

2/ The National Wireless Resellers Association ("NWRA"), which later merged with TRA, filed a petition seeking reconsideration of the decision to sunset the resale rule.

3/ See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, WT Docket No. 98-100 et al., FCC 98-134, released July 2, 1998 ("PCIA Forbearance Order") at para. 35 (summarizing benefits of FCC's long-standing wireless resale policy).

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full-service packages of telecommunications services -- which will include wireless services.

Smaller Consumers Benefit: Wireless resale is also essential to protect the interests of consumers -- in particular smaller business and individual consumers -- who reap the benefits of wireless resale in terms of lower prices, better customer service, and innovative offerings.

Consumer Choice: Only wireless resellers can provide their customers a choice of multiple underlying networks, each of which has unique advantages and disadvantages from the point of view of each customer.

Low Entry Barriers: Wireless resale also is necessary to keep entry barriers low in the wireless market and in the full-service market that is emerging. Small businesses need resale in order to enter and compete in the provision of telecommunications services, whether providing wireless services only or providing packages that include all telecommunications services.

The continuation of the resale rule will ensure that consumers will continue to enjoy these benefits of resale, regardless of how the wireless market develops. Just as in the long distance market, the resale requirement is a prophylactic rule that ensures that resale will remain available even as the number of facilities-based carriers multiplies. When the market has developed to the point where underlying carriers have strong incentives to deal fairly with resellers, and to treat them as they would treat any other customer, then the rule will have no real effect on the carriers. On the other hand, if a market has not reached that point, or if there is a carrier that for anticompetitive reasons refuses to deal with a reseller competitor, then the rule is there to ensure that the carrier will not discriminate against resellers.

The Commission should eliminate the resale sunset on reconsideration.

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II. Prohibition of Direct and Indirect Restrictions on Resale

In its reconsideration order, the Commission must make it clear that, in accordance with the resale rule, it will not tolerate unreasonable restrictions on resale, either direct or indirect, such as a refusal to provide a resale agreement or refusal to provide access to billing data. As the Commission already has held, both *direct and indirect* restrictions on resale are prohibited under the FCC's prior orders:

[N]o provider may directly or indirectly restrict resale in a manner that is unreasonable in light of the policies stated here. Under this aspect of the rule, an explicit ban on resale is unlawful, *as are practices that effectively (i.e. indirectly) restrict resale*, unless they are justified as reasonable. 4/

TRA has filed in this proceeding the results of surveys of its members demonstrating that most PCS and SMRS carriers are refusing to offer resale agreements. 5/ Many CMRS providers also are refusing to provide access to billing information in electronic format, even when that information is readily available and is provided to the CMRS providers' largest customers. Both of these practices violate the resale rule.

Refusal to Offer a Resale Agreement. Most PCS providers today refuse to provide a resale agreement. Without such an agreement, resellers simply do not

4/ CMRS Resale Order at para. 12 (emphasis added).

5/ PCIA Forbearance Order at para. 38 and n.114 ("[T]he record contains significant evidence suggesting that despite the current resale rule, abuses in the form of refusals to offer services for resale still exist," citing, *inter alia*, TRA's July 1997 Survey). See also Letter from Ernest B. Kelly, III, President, TRA, to Chairman William E. Kennard, FCC, attaching 1997 TRA Year End Survey of Wireless Resellers.

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have the ability to resell CMRS service. The refusal of a CMRS provider to offer a resale agreement is equivalent to an indirect restriction on resale.

Retail contracts are not appropriate for resellers. Indeed, many retail agreements contain restrictions on resale. To protect both the underlying carrier and the reseller, all cellular carriers have developed resale agreements that provide for such matters as rates, payment terms, volume commitments, allocation of liability, provision of billing information, and termination penalties. ^{6/} PCS and SMR providers must do the same in order to comply with the resale rule.

Access to Billing Information. Refusal to provide a reseller access to billing information in electronic (or similar) format, when such a format is readily available to the underlying carrier, also violates the prohibition on indirect restrictions on resale. Such a format is essential, as a practical matter, to enable the reseller to generate its own bills. Carriers must not be permitted to discriminate against resellers by denying them access to such electronic billing information.

III. The Need for Enforcement of Existing Resale Requirement

The Commission must make clear in its reconsideration order that it will not tolerate the pattern of noncompliance with its resale requirements that is evident in the wireless industry, particularly among PCS and SMR carriers. As discussed above, there is substantial evidence of noncompliance before this Commission. ^{7/}

The Commission should take strong enforcement action against any CMRS provider that is failing to meet its resale obligations. These enforcement

^{6/} Some carriers are willing to offer a sales agent arrangement but refuse to permit resale. Sales agents, unlike resellers, are not true competitors of the underlying carrier. The reseller, unlike the agent, can charge a different (generally lower) rate than the underlying carrier, can offer different terms and conditions of service, and can provide better customer service and billing.

^{7/} See n. 5, supra.

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actions might include (1) expedited action on complaints by wireless resellers; (2) forfeiture proceedings; (3) denial of additional applications for licenses or for renewal of existing licenses; and (4) commencement of license revocation proceedings.

IV. The Need to Re-examine the Wireless Market Before Sunset

As discussed above, TRA strongly urges the Commission to eliminate the sunset of the resale requirement on reconsideration. If the Commission nevertheless decides to retain the sunset, it must at a minimum do two things. First, it must provide in its reconsideration order that the Commission will re-examine the state of wireless resale at some time before the resale obligation is to sunset. If the market has not developed according to the Commission's predictions, the agency will then be in a position to extend the sunset date. Second, as discussed in the next section, the Commission must protect existing customers of resellers from losing service from their chosen provider if and when a sunset takes place.

In its recent decision denying the PCIA request for forbearance from the wireless resale rule, the Commission concluded that market forces have not been sufficient to ensure that carriers will not discriminate against wireless resellers:

[T]he record contains significant evidence suggesting that despite the current resale rule, abuses in the form of refusals to offer services for resale still exist. [T]hese allegations, which have not been effectively refuted, support our conclusion that the resale rule has not been shown unnecessary to ensure that rates and practices are just, reasonable, and non-discriminatory. 8/

Given these factual findings, it is plain that the Commission must undertake a

8/ PCIA Forbearance Order at para. 38 (footnotes omitted).

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re-examination of the wireless marketplace before it can lawfully eliminate the wireless resale rule. Indeed, in the LMDS context, the Commission recently affirmed its prior conclusion that it would need to re-evaluate the level of competition in the LMDS market before it could permit the scheduled sunset of the eligibility restrictions on ILEC and cable company ownership of in-region LMDS licenses. ^{9/}

V. The Need to Protect Customers From Losing Service

If the Commission decides to retain the sunset of the resale rule, it must make it clear that notwithstanding any contractual provisions in any resale agreements executed before or after the reconsideration order, no CMRS provider may terminate service to any reseller's customers at or after the sunset takes effect. This is necessary to preserve continuation of service to customers from their chosen service provider after the sunset.

A number of carriers have demanded that provisions be included in resale agreements that could permit them to assert the right to terminate service to all of the reseller's customers as soon as the Commission resale rule is lifted. Such provisions, which reflect the underlying carrier's hostility to resale, could be read to permit CMRS carriers to terminate service to every reseller's customers once the

^{9/} Specifically, the Commission stated that it would need to conduct a study "examining whether 'there [has been] sufficient entry and increases in competition in the markets at issue . . . for us to be able to sunset the restrictions on incumbent LECs and cable companies.'" Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules, Third Order on Reconsideration, CC Docket No. 92-297, FCC 98-15 (rel. Feb. 11, 1998), at para. 113, quoting Second Report and Order in CC Docket No. 92-297, 12 FCC Rcd 12545, 12633 (para. 198). The Commission held that "the [eligibility] restrictions may be extended if, upon review prior to the [scheduled sunset date], we determine that maintaining the restriction would further promote competition in the local exchange or MVPD [multichannel video programming distribution] market, or both." Third Order on Reconsideration at para. 112, quoting Second Report and Order, 12 FCC Rcd at 12616 (para. 160).

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sunset takes place. 10/ Carriers would have strong incentives to terminate a reseller's customers, moreover, because those customers would find it easy (though probably more expensive) to retain service with that underlying carrier.

Wireless resellers today have approximately two million customers. These and future customers should not be put at risk of losing service as a result of the underlying carrier's anticompetitive actions.

In sum, the Commission must make it clear on reconsideration that regardless of any contractual provisions in resale agreements, the underlying CMRS providers may not lawfully terminate service to a customer of a reseller on the ground that the Commission's resale obligation has expired. 11/

10/ Section 202(a) of the Act, 47 U.S.C. § 202(a), also would prohibit a carrier from terminating service to its reseller customers if it does not terminate service to its own retail customers. Nevertheless, to forestall such anticompetitive behavior, the Commission should provide expressly that such a termination of service would violate the Act, regardless of any contract provisions that might be read to permit such termination of service.

11/ We do not here address the question whether Sections 201(b) and 202(a) of the Act, 47 U.S.C. §§ 201(b), 202(a), provide an independent basis for requiring a facilities-based carrier to provide service to a reseller in the absence of the Commission's express resale requirement.

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Conclusion

For the reasons discussed above and in the NWRA Petition for reconsideration, TRA urges the Commission to eliminate the sunset of the resale requirement. If the Commission retains the sunset, it should fully enforce the resale rule as long as it remains in place, re-evaluate the wireless marketplace before allowing the sunset to take effect, and expressly protect the right of resellers to be free from a cutoff of service to their customers if and when the sunset does take effect.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "David Gusky", followed by a small flourish or mark.

David Gusky
Vice President and Director of
Wireless Services

Enclosures

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Magalie R. Salas, Secretary
Daniel Phythyon, Chief, Wireless Telecommunications Bureau
John Cimko
Nancy Boocker